SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

Supreme Court, U.S.
FILED
NOV 17 1967
JOHN F. DAVIS, CLERK

No. 829

AETNA CASUALTY AND SURETY COMPANY, ET AL.,
Petitioners,

vs.

OSBORNE-McMILLAN ELEVATOR COMPANY, INC.,
A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

DONALD N. CLAUSEN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

FRANCIS J. WILCOX,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

RUDOLPH E. ANDERSON,
218 Telegram Building,
Superior, Wisconsin,
Counsel for Petitioners.

CLAUSEN, HIRSH, MILLER & GORMAN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

WILCOX & WILCOX,
Suite 500,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

HUGHES, ANDERSON, DAVIS & WITKIN,
218 Telegram Building,
Superior, Wisconsin.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Citations to the Opinions Below	1
Grounds on Which the Jurisdiction of This Court Is Invoked	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
The Wisconsin Opinion Was Irreconcilable With the Governing Minnesota Opinion	4
Raising of Federal Question	11
Argument	14
Reasons for Granting the Writ	14
The failure of the highest tribunal of a particular state to accord full faith and credit to a public act as expressed by the decisional law of the highest tribunal of another state, concededly governing the issues in a case, is a denial of the Constitutional provision guaranteeing such right	18
The Supreme Court of Wisconsin, in its opinion on the second appeal did not give erroneous construction to the views of the Minnesota Supreme Court in *Honeymead*, but denied their validity by actually rendering a decision diametrically opposed to the *Honeymead* holding	20
Conclusion	25

APPENDIX.

(See Separate Volume)

	APPENDIX PAGE
Opinion of the Supreme Court of Wisconsin in the Second Appeal, in *Aetna Casualty and Surety Company, et al.* v. *Osborne-McMillan Elevator Company*	1
Opinion of the Supreme Court of Wisconsin, in the First Appeal, in *Aetna Casualty and Surety Company, et al.* v. *Osborne-McMillan Elevator Company*	11
Opinion of the Supreme Court of Minnesota, in *Honeymead Products Co., et al.* v. *Aetna Casualty and Surety Company, et al.*	23
Excerpts from Brief of Plaintiffs-Appellants in Second *Osborne* Appeal	38
Excerpt from Argument in Support of Appellants' Motion for Rehearing in Second *Osborne* Appeal	42
Unreported Trial Court Opinion in *Aetna Casualty and Surety Company, et al.* v. *Garvey Elevators, Inc., et al.* (Nebraska) (Three Consolidated Cases)	46
Unreported Trial Court Opinion in *Aetna Casualty and Surety Company, et al.* v. *Sierra Petroleum Co.* (Kansas)	49

TABLE OF CASES CITED.

PAGE

American Casualty Co. of Reading, Pa. v. *Myrick* (5th Cir., 1962), 304 F. 2d 179 6

Bradford Electric Light Co. v. *Clapper*, 286 U. S. 145; 52 S. Ct. 571; 76 L. Ed. 1026 (1932) 15

Glenn v. *Garth*, 147 U. S. 360; 13 S. Ct. 350; 37 L. Ed. 203 (1893) 24

Hughes v. *Fetter*, 341 U. S. 609; 71 S. Ct. 980; 95 L. Ed 1212 (1950) 19

Hulcher Soya Products, Inc. v. *Millers' Mutual Fire Insurance Association*, 5 Ill. App. 2d 235; 124 N. E. 2d 570 (1955) 7

John Hancock Mutual Life Insurance Co., v. *Yates*, 299 U. S. 178; 57 S. Ct. 129; 81 L. Ed. 106 (1936) 15

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430; 64 S. Ct. 208; 88 L. Ed. 149 (1943) 16, 19

Milwaukee County v. *M. E. White Co.*, 296 U. S. 268; 56 S. Ct. 229; 80 L. Ed. 220 (1935) 18

Missouri ex rel. Missouri Insurance Co. v. *Gehner*, 281 U. S. 313; 50 S. Ct. 326; 74 L. Ed. 870 (1930) 12

Modern Woodmen of America v. *Mixer*, 267 U. S. 544; 45 S. Ct. 389; 69 L. Ed. 783 (1925) 20

Morris v. *Jones*, 329 U. S. 545; 67 S. Ct. 451; 91 L. Ed. 488 (1947) 12

National Bellas Hess, Inc. v. *Illinois Department of Revenue*, 386 U. S. 753; 87 S. Ct. 1389; 18 L. Ed. 2d 505 (1967) 22

Ohio ex rel. Bryant v. *Akron Park District*, 281 U. S. 74; 50 S. Ct. 228; 74 L. Ed. 710 (1930) 12

Peterson v. *Royal Ins. Co.*, 251 N. C. 61; 110 S. E. 2d 441 (1959) 7

Roche v. *McDonald*, 275 U. S. 449; 48 S. Ct. 142; 72 L. Ed. 365 (1928) 12

Royal Arcanum v. *Green*, 237 U. S. 531; 35 S. Ct. 724; 59 L. Ed. 1089 (1914) 16, 17

Saunders v. *Shaw*, 244 U. S. 317; 37 S. Ct. 638; 61 L. Ed. 1163 (1917) 12

Sovereign Camp, W. W. v. *Bolen*, 305 U. S. 66; 59 S. Ct. 35; 83 L. Ed. 45 (1938) 20

Union National Bank v. *Lamb*, 337 U. S. 38; 69 S. Ct. 911; 93 L. Ed. 1190 (1949) 12

United Commercial Travelers v. *Wolfe*, 331 U. S. 586; 67 S. Ct. 1355; 91 L. Ed. 1687 (1946) 20, 21

TREATISES.

Wolfson and Kurland, *Robertson and Kirkman, Jurisdiction of the Supreme Court of the United States* (1951), Sec. 16, pp. 34-35 11

Wolfson and Kurland, *Robertson and Kirkman, Jurisdiction of the Supreme Court of the United States* (1951), Sec. 76, p. 130, n. 2 12

LAW REVIEW ARTICLES.

Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. of Chicago L. Rev. 9 (1958) 16, 21

Jackson, *Full Faith and Credit—The Lawyers Clause of the Constitution*, 45 Columbia L. Rev. 1 (1945) 15, 19, 23

Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 Rutgers L. Rev. 523 (1959) 22

Ross, *Full Faith and Credit in a Federal System*, 20 Minnesota L. Rev. 140 (1936) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.....

AETNA CASUALTY AND SURETY COMPANY, ET AL.,
Petitioners,

vs.

OSBORNE-McMILLAN ELEVATOR COMPANY, INC.,
A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in the above entitled case on June 9, 1967.

Citation to Opinions Below.

(1) *Aetna Casualty and Surety Company* v. *Osborne-McMillan Elevator Co.*, ... Wis. 2d .....; 151 N. W. 2d 113 (1967).

(2) *Honeymead Products Co.* v. *Aetna Casualty and Surety Co.*, 275 Minn. 182, 146 N. W. 2d 522 (1966).

(3) *Aetna Casualty and Surety Company* v. *Osborne-McMillan Elevator Co.*, 26 Wis. 2d 292, 132 N. W. 2d 510 (1965).

Grounds on Which the Jurisdiction of This Court Is Invoked.

The judgment of the Supreme Court of Wisconsin was entered on June 9, 1967. A petition for rehearing was filed and was denied by order entered August 22, 1967. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1257(3), providing for review of decisions of the highest courts of review of the several states.

Question Presented.

The question raised by this petition is whether the highest Court of the State of Wisconsin has erred in failing to give full faith and credit, as required by the United States Constitution, to the concededly governing Minnesota law on the issue involved, as expressed by a public act of Minnesota in the form of a final decision of the Supreme Court of Minnesota.

Constitutional Provision Involved.

"Article IV, Section 1 of the Constitution of the United States: Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. * * *"

STATEMENT OF THE CASE.

The original action was filed in the Circuit Court for Douglas County, Wisconsin, by the Petitioners as insurers, seeking to determine whether an event happening on January 17, 1962, at Superior, Wisconsin, in which a steel grain storage tank, holding over 360,000 bushels, was totally destroyed, was an "explosion" within the meaning of the insurance policies issued to Respondent. The insurance policies involved were issued by an insurance agency in Minneapolis, Minnesota and covered the property of the insured Respondent located in 39 separate locations in five different states, including Wisconsin.

The first trial resulted in a jury verdict and judgment in favor of the insured Respondent. An appeal was taken from this judgment to the Supreme Court of Wisconsin (there being no intermediate court of appeal in Wisconsin) and an order was entered setting aside the judgment and remanding the case for a new trial. Upon the second trial a jury verdict was again returned in favor of the insured Respondent and judgment entered upon such verdict. Upon a second appeal, the Supreme Court of Wisconsin, on June 9, 1967, affirmed this judgment. Petitioners were denied a rehearing by order entered August 22, 1967.

It was conceded by the parties at both trials, and likewise recognized by the Supreme Court of Wisconsin, that the question whether the occurrence constituted an "explosion" was to be determined by the substantive law of Minnesota. However, until after the second trial, there was no Minnesota decision governing the issue involved. Between the entry of the second judgment and the second appeal to the Wisconsin Supreme Court, the Supreme Court of Minnesota in *Honeymead Products Company, Inc.* v. *Aetna Casualty*

and Surety Company, Inc., et al., 275 Minn. 182, 146 N. W. 2d 522 (1966), had occasion to pass upon the precise issue involved, *i.e.*, the essential elements necessary to sanction judicial recognition of an event as an "explosion." From and after the rendition of the 1966 Minnesota decision there was in existence Minnesota substantive law directly applicable to, and governing the identical issue presented in the case at bar. However, in the second appeal, even though Petitioners pointed out this law to the Wisconsin Supreme Court and relied upon it in their arguments to the Court (see Appendix, p. 38), the Supreme Court of Wisconsin refused to give full faith and credit to such governing Minnesota law. In affirming the judgment obtained at the second trial, the opinion of the Supreme Court of Wisconsin flagrantly disregards the Minnesota substantive law and thereby fails to give full faith and credit to Minnesota law as required by Article IV, Section 1 of the United States Constitution.

It would serve no useful purpose here to belabor this Court with the detailed technical facts which were involved in the trial resulting in the judgment which was affirmed by the Supreme Court of Wisconsin. To the extent that such facts are or may be pertinent such facts are well summarized in the Opinion of the Supreme Court of Wisconsin upon the second appeal, see Appendix, p. 2.

The Wisconsin Opinion Was Irreconcilable With the Governing Minnesota Opinion.

Suffice it to say that the ultimate ruling of the Supreme Court of Wisconsin in the second *Osborne* opinion was predicated upon a concept of "explosion" completely at odds with that expressed in the concededly governing law of Minnesota as expressed in *Honeymead*. *Honeymead* was not a mere recent expression in an area of law often considered by Minnesota courts; it was and still remains the

sole expression of Minnesota law defining an occurrence entitled to legal recognition as an "explosion." *Honeymead* concerns an identical occurrence; the sole difference between *Honeymead* and the instant case concerns the contents of the tank. The Supreme Court of Minnesota recognized this factual distinction between *Honeymead* and *Osborne* but held such distinction to be immaterial, and thus the Minnesota Supreme Court in no way limited or distinguished, on this account, the reasoning of the first *Osborne* opinion, from which it most liberally quoted, 146 N. W. 2d 522, 528.

The most crucial aspects of the *Honeymead* (Minnesota) definition are the word for word transcription of the first *Osborne* (Wisconsin) opinion. Thus, the first *Osborne* opinion, in its attempt to guess at concededly governing Minnesota law, is a unique and exact preview of the applicable Minnesota law. No departure from the first *Osborne* opinion is required in order to give full faith and credit to Minnesota law, for Minnesota law literally adopted the very law of the first *Osborne* decision. The result of this interrelationship is that denial of full faith and credit to Minnesota law is a radical departure from the first *Osborne* opinion.

In the first *Osborne* opinion, the Supreme Court of Wisconsin distinguished an explosion from any other occurrence in four brief passages:

A. "* * * an explosion * * * must include the *element of an active force* * * * which seeks a sudden and violent release by breaking the container.* * *" (132 N. W. 2d 510, 513). (Emphasis supplied.)

B. "* * * an explosion as commonly understood is not one element * * * but the sum total of several elements not the least of which consists of an *active force* which suddenly and violently *exerts* itself in some form.* * *" (132 N. W. 2d at 514). (Emphasis supplied.)

C. "* * * In explosions involving a non-explodable substance there must be an *internal active force* created which breaks out of its confinement.* * *" (132 N. W. 2d at 514). (Emphasis supplied.)

D. "*The necessity of the existence of an active force is the distinguishing characteristic of what has been held to be an explosion in the decided cases.* * * *" (132 N. W. 2d at 514). (Emphasis supplied.)

The repeated phrase here is "active force," an active force which suddenly and violently "seeks release", or "exerts itself", or "breaks out." Clearly, the first *Osborne* opinion defines "explosion" as an active force or cause, not as the end result of that exertion of force. Such opinion made it clear that no event was entitled to legal recognition as an "explosion" unless the causative factor was a force actually in motion, as distinguished from mere energy potentially stored and not yet in motion. The subsequent "release" (or breaking out) of the force in motion was regarded as but an effect or result of the "explosion."

So too, *Honeymead* literally accepts this definition, focusing on active force (force in actual motion) seeking release. The Minnesota Supreme Court insists that an "explosion" can occur only if there is a sudden or violent increase of internal pressure (resulting from a sudden expansion of the contents—the "expansion" also being a force actually in motion, not an end result).

> "* * * There was no evidence of any sudden or violent *increase* of internal pressure commonly associated with an explosion.* * *." 146 N. W. 2d at 528.

The Court then sets out the three elements of its definition of explosion. The first element consists of the first three of the four passages from the first *Osborne* opinion quoted immediately above. The second element focuses on *American Casualty Co. of Reading, Pa.* v. *Myrick* (5th

Cir.—1962), 304 F. 2d 179, 183, which pinpoints, as an explosion, the sudden breaking forth of a confined substance as a result of an internal force. This continues the concept of finding the "explosion" only in the causative act of the force in motion exerting itself.

The third essential element of "explosion" centers upon the concept of "expansion" as the force in motion which causes the contents to break out, all as found in *Peterson* v. *Royal Ins. Co.*, 251 N.C. 61, 64, 110 S. E. 2d 441, 443:

> "* * * Internal pressure, causing a sudden expansion causing a bursting or disruption are genuine elements of explosion." 146 N. W. 2d at 528.

Here, the essence, again, is "internal pressure causing". In developing this concept, *Honeymead* also relied upon *Hulcher Soya Products, Inc.* v. *Millers' Mutual Fire Insurance Association*, 5 Ill. App. 2d 235, 124 N. E. 2d 570, a decision holding that an insured had failed to prove the existence of explosion where there was no direct evidence of a sudden development of an internal force or that the incident was accompanied by a rapid or sudden expansion of air. These decisions, relied on by *Honeymead*, in formulating, for the first time in Minnesota, a definition of "explosion", find the "explosion" in the force in motion, a causative factor, and place the "release" of such force in proper perspective as a mere end result or product of the "explosion".

The Wisconsin Supreme Court's second *Osborne* opinion, with respect to which petitioners here seek review, does violence most crucially, to the governing Minnesota law when, in defining an "explosion", it shifts the focus to a concept diametrically opposed to Minnesota law by finding the "explosion" in the "release" of any pressure, irrespective of whether a force in motion was or was not the causative factor of the occurrence. The Wisconsin

Supreme Court flatly denies both what it said in its first opinion and what Minnesota approved and enunciated as the law of Minnesota, when it concludes:

> "* * * There is a distinction between a sudden and violent increase and a sudden and violent release. It is the sudden and violent release of the force which is an essential element of an explosion." 151 N. W. 2d at 116.

This dramatic shift in a definition of "explosion" from an internal force in motion (active force) suddenly and violently seeking release, to the end result of violent "release", no matter in what way that "release" comes about, violates the very essential focus of Minnesota law.

When the Wisconsin Supreme Court, in the second *Osborne* decision, made its dramatic and radical shift, finding an explosion in the "release" of any pressure, it literally followed and accepted the argument advanced by respondent in that appeal, the respondent arguing in its brief (Respondent's Brf. 2d *Osborne* Appeal, p. 14):

> "* * * It is the bursting out of the contents and the tank wall [the release of the contents] which marks the event with its qualities as an explosion. * * *" (Emphasis and parenthetical explanation ours.)

This contention by respondent was and has been respondent's persistent contention, not only at all stages of the *Osborne* case, but was also advanced on behalf of the appellant (the insured) in *Honeymead,* the appellant there being represented by the same counsel appearing for respondent in the two *Osborne* appeals.

In the first *Osborne* appeal, respondent contended (Respondent's Brf. 1st *Osborne* Appeal, p. 25):

> "* * * It is not the fact that the internal pressure or force was increased, but the fact that the internal pressure was suddenly released after the initial fracture which makes these familiar phenomena explosions, as the word is used in common parlance."

This was an attempt to find the "explosion" simply in the release of pressure rather than the cause of the pressure. The Wisconsin Supreme Court rejected this concept in its decision on the first appeal, and concluded that while a release of the contents sometimes accompanies an "explosion", the "explosion" is to be found in the causative factors, not the mere release of the contents. The same emphasis upon "release" of pressure and total disregard of the causative factors was the essence of the appellants' (insureds') position in *Honeymead,* advanced by the same counsel appearing for respondent below. In its brief in *Honeymead,* p. 31, appellant said:

> "* * * Certainly, it is not insured's contention that the crack constituted an explosion. What then was the explosion? It was the violent bursting forth of the walls of the tank due to the tremendous pressure or force of the oil—along with the sudden release of 315,000,000 foot-pounds of potential energy."

The Supreme Court of Minnesota rejected this contention, as did the Supreme Court of Wisconsin on the first *Osborne* appeal. When the Wisconsin Supreme Court rendered its decision on the second *Osborne* appeal, it is there that we find that Court departing from the views which it expressed in its decision on the first appeal, and from the explosion concepts as determined in *Honeymead.*

Upon the petition here at bar, respondent should not be heard to urge a contention contrary to its persistent position which was first accepted by the Wisconsin Supreme Court on the Second Appeal in *Osborne.*

Though the Wisconsin court comments as follows about *Honeymead,*

> "* * * The decision quoted with approval from our first opinion, wherein we pointed out an element of explosion was the sudden and violent release of the pressure from the container. 146 N. W. 2d at 528. * * *" 151 N. W. 2d at 116.

this reference is disingenuous, for in the first *Osborne* opinion, the same Court said:

> "* * * An explosion * * * must include the element of an active force * * * which seeks a sudden and violent release by breaking the container.* * *" 132 N. W. 2d at 513.

Further, in its first opinion, this same Court held that an instruction to the effect that there may be an explosion without a sudden development of internal force or pressure was "tantamount to directing a verdict" for the insured and "prejudicially erroneous" in the interpretation of the word "explosion." 132 N. W. 2d at 513 (Appendix, p. 15).

The Wisconsin Supreme Court, in avoiding the impact of the *Honeymead* opinion, concluded that its "reading" of *Honeymead* was consistent with its (Wisconsin's) opinion in the second appeal. Though the Wisconsin Supreme Court may consider that it is just "reading" the *Honeymead* decision, this self-serving conclusion by the court with respect to the governing effect of other law cannot be taken at face value. The substitution of "release no matter how caused" for the focus of "active force suddenly and violently seeking release" is a fundamental shift in concept from white to black that goes far beyond mere "reading." Such shift produced a holding irreconcilable with *Honeymead*. The Court's radically new position, diametrically opposed to Minnesota law, is clearly demonstrated by its holding:

> "* * * *The explosion, per se, is more an effect than a cause,* although it in turn can be the cause of other damage." 151 N. W. 2d at 117. (Emphasis supplied.)

This gross departure from Minnesota law in the second *Osborne* opinion, taken literally, makes every occurrence which involves a sudden release of pressure an explosion. This conclusion embraces an infinite variety of occurrences

which no layman, scientist, or judicial officer could ever regard as an explosion: the breaking of a dam, the collapse of a building from overloading, or the ripping of a paper bag filled with heavy groceries are examples. All of these occurrences involve a sudden release of pressure. Yet none of these occurrences accord either legally or practically with any concept of explosion.

Petitioners believe that any further statement of the case other than this presentation of the law of Minnesota and the contradictory view expressed by the Supreme Court of Wisconsin in the second *Osborne* opinion is not essential to a determination of Petitioners' right to appeal.

It is clear that the Supreme Court of Wisconsin intended that the issues presented by the Wisconsin case were to be resolved by the substantive law of Minnesota:

> "* * * The court determined the Minnesota substantive law was controlling and no issue is taken with that ruling on this appeal. There appears to be no ruling of the Minnesota Supreme Court on the question involved * * *" 132 N. W. 2d at 513 (Appendix, p. 15).

Wisconsin's frank recognition of the controlling presence of Minnesota law eliminates the most complex and delicate questions of full faith and credit for the public acts of a sister state. Wisconsin's denial of full faith and credit to the governing law of Minnesota is, thus, the sole issue presented here.

Raising of Federal Question:

A state court's construction of provisions of the Federal Constitution, such as the Full Faith and Credit Clause, can be a denial of a right or immunity under the laws of the United States. See, Wolfson and Kurland, *Robertson and Kirkman-Jurisdiction of the Supreme Court of the United States* (1951), Sec. 16, pp. 34-35. (Hereafter, *Wolfson.*) A petition for a writ of certiorari is the appropriate means

by which to initiate review of such a construction. See, *Union National Bank* v. *Lamb,* 337 U. S. 38, 39-40; 69 S. Ct. 911; 93 L. Ed. 1190 (1949); *Morris* v. *Jones,* 329 U. S. 545, 547; 67 S. Ct. 451; 91 L. Ed. 488 (1947); *Roche* v. *McDonald,* 275 U. S. 449, 450; 48 S. Ct. 142; 72 L. Ed. 365 (1928).

The first point Petitioners urged in their Petition for Rehearing addressed to the Wisconsin Supreme Court (See Appendix, p. 42) meets the jurisdictional requirement of the timely raising of a federal question. Timeliness is established by the "surprise doctrine." *Saunders* v. *Shaw,* 244 U. S. 317, 320; 37 S. Ct. 638; 61 L. Ed. 1163 (1917); *Ohio ex rel. Bryant* v. *Akron Park District,* 281 U. S. 74, 79; 50 S. Ct. 228 (1930); 74 L. Ed. 710, and *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313, 320; 50 S. Ct. 326; 74 L. Ed. 870 (1930). See also cases cited at *Wolfson,* Sec. 76, p. 130, Note 2. This exception to the general rule governing the raising of a federal question, enunciated by Justice Holmes in the *Saunders* case, makes timely the raising of a federal question in a Petition for Rehearing if it appears that the question was first brought into the case by an unexpected decision of the state court and that there was no prior opportunity to assert the claimed federal right.

> "* * * But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. * * *" 244 U. S. 317 at 320.

Petitioners informed the Wisconsin Supreme Court of the newly available Minnesota law on their second appeal (see Appellant's Brief, Appendix, p. 38), but could not have anticipated the diametric shift in focus of definition

which the second *Osborne* opinion announced. The Petitioners raised the federal question, then, at their first opportunity by urging as the first point in their Petition for Rehearing (Appendix, p. 42):

> "This Court, in its opinion of June 9, 1967, failed to give full faith and credit to the law of Minnesota, as recently determined in *Honeymead Products, Inc.* v. *Aetna Casualty and Surety Co., Inc. et al.*"

The refusal by the Wisconsin Supreme Court to rehear the case constituted an unconstitutional construction of the Full Faith and Credit Clause of the United States Constitution.

ARGUMENT.

Reasons for Granting the Writ.

Upon this petition, it will not be necessary for this Court to decide whether the definition of "explosion" expressed by the Supreme Court of Minnesota, on one hand, or the radically different definition expressed by the Supreme Court of Wisconsin, on the other hand, is correct. We recognize that the courts of each state are free to autonomously determine such matters insofar as they are limited to issues governed by the local state law. However, in the case at bar, it is conceded, both by the parties and by the Wisconsin Supreme Court, that the substantive law of Minnesota governs the decision of the Wisconsin case. The only question presented here is whether the Wisconsin Supreme Court gave full faith and credit to the *Honeymead* case, the substantive law of Minnesota governing the issue here, or whether it failed to accord full faith and credit to this Minnesota law.

The Full Faith and Credit Clause declares that its protection extends to the public acts of a state:

> "*Article IV, Section 1:*
> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. * * *"

The full faith and credit protection extended to a state's law, found in its judicial decisions, its public acts, has not received as much analytical attention as the full faith and credit extended to the *res judicata* element of judicial proceedings. Justice Robert H. Jackson, more than any other student of the Constitution, has studied this aspect of the Full Faith and Credit Clause. He does not find

it difficult to conclude that the very logic of our judicial system impels a conclusion that the law of a state, by whatever source declared, is entitled to credit:

> "The Constitution by use of the term 'public acts' clearly includes statutes. But it makes no mention of decisional law. However an underlying point of *Erie* v. *Thompkins* was that 'whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern.' [304 U.S. 64, 78 (1938).] It is not farfetched to argue that full faith and credit for judicial proceedings requires recognition of their effect as decisional law, if they have that effect in the state where rendered, as well as of their res judicata effect. In any event, while the point seems not to have been discussed, the Court has so acted and talked that we may deal with this part of our subject on the assumption that what is entitled in proper cases to credit is the law of the state by whatever source declared." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Columbia L. Rev. 1, 12 (1945).

It is this aspect of the Full Faith and Credit Clause which Petitioners respectfully ask this Honorable Court to clarify.

Justice Jackson's argument gathers strength from a number of sources. It would be clearly erroneous to conclude that a state's laws can only be found in its legislative enactments. *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145, 155; 52 S. Ct. 571; 76 L. Ed. 1026 (1932); *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178, 183; 57 S. Ct. 129; 81 L. Ed. 106 (1936). Many state laws can be found in the state's judicial decisions. Our system of jurisprudence accepts as a basic premise that judicial precedent presents the law of a state in the same way that a state statute presents the law of a state. Indeed, we frequently speak of statutes as codified common law.

Such compelling force lies behind this conclusion that G. W. C. Ross, in a famous article, flatly declared:

> "* * * It is believed any distinction based on the full faith and credit provision between foreign statute law and judge-made law, has, in view of the 14th Amendment, no longer any substantive importance; and, niceties of verbal constitutional exegesis aside, no good reason appears why the constitutional standing of a rule of law of State (or country) X, before the courts of State Y, should depend on how it came to be the law of X. If it is now the law of X, it would seem it ought to be equally obligatory (or non-obligatory) upon State Y." Ross, *Full Faith and Credit in a Federal System,* 20 Minnesota L. Rev. 140, 180-181 (1936).

Professor Currie has reached the same conclusion. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. of Chicago L. Rev., 15-16 (1958).

The full faith and credit clause traditionally extends to public acts which take the form of statutes and to judicial proceedings which a party wishes a second state to recognize. Common sense dictates that law, made applicable by the choice of law process, as here, and declared after a judicial proceeding, is also a public act arising from a judicial proceeding.

This Honorable Court has never definitively stated this conclusion. It has, however, necessarily implied this conclusion in two especially important cases. In *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 445; 64 S. Ct. 208; 88 L. Ed. 149, 159 (1943), Chief Justice Stone, speaking for the Court, declared:

> "* * * The law of a state is embodied as well in its common law rules as in its statutes. (Citations omitted.) * * *"

Chief Justice White, speaking for the Court in *Royal Arcanum* v. *Green,* 237 U. S. 531, 545; 35 S. Ct. 724; 59 L. Ed. 1089, 1101 (1914) (a case concerning a Massachu-

setts mutual benefit society's power under its charter and by-laws to increase its assessment rates), describes the full faith and credit due a court judgment in a case between other parties:

> "* * * [W]e observe that the settled principles which we have applied in determining whether the controversy was governed by the Massachusetts law clearly make manifest how inseparably what constitutes the giving of full faith and credit to the Massachusetts judgment is involved in the consideration of the application of the laws of that state, and therefore, as we have previously stated, how necessarily the express assertion of the existence of a right under the Constitution of the United States to full faith and credit as to the judgment was the exact equivalent of the assertion of a claim of right under the Constitution of the United States to the application of the laws of the State of Massachusetts. We say this because, if the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and, on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized, the duty to give effect to the judgment in such case being substantially the same as the duty to enforce the judgment."

It can only be concluded that the Court, in *Royal Arcanum*, recognized the two-fold effect of a judicial determination: the *res judicata* effect as between the litigating parties is entitled to full faith and credit, and, when applicable, the holding is entitled to full faith and credit as the law of the state.

Wisconsin's refusal to grant our Petition for Rehearing has answered in the negative the following federal question

of substance not yet definitively settled by this Honorable Court: Is the Minnesota decision a public act to which the full faith and credit compulsion extends? This negative answer to a federal question involving one of the most basic principles of our federal union should be reviewed by this Court. The Full Faith and Credit Clause is crucial to a necessarily free interstate movement of goods and services, such as insurance.

I.

The Failure of the Highest Tribunal of a Particular State to Accord Full Faith and Credit to a Public Act as Expressed by the Decisional Law of the Highest Tribunal of Another State, Concededly Governing the Issues in a Case, Is a Denial of Full Faith and Credit and a Violation of the Constitutional Provision Guaranteeing Such Right.

Full faith and credit is a basic federal constitutional right arising from the Full Faith and Credit Clause's central task of assuring that each state remains an integral part of the federal union.

> "* * * The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as a right, irrespective of the state of its origin. * * *" *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 276-277; 56 S. Ct. 229; 80 L. Ed. 220 (1935) (Stone, J. for the Court).

Justice Stone's recognition that the Full Faith and Credit Clause, like the Commerce Clause, is a force promoting national unity has been emphatically reiterated on two sub-

sequent occasions. *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 443; 64 S. Ct. 208; 88 L. Ed. 149 (1943) (Stone, J.); *Hughes* v. *Fetter,* 341 U. S. 609, 612, n. 9; 71 S. Ct. 980; 95 L. Ed. 1212 (1950) (Black, J).

The Framers of the Constitution were reaching beyond a mere concept of political or economic union when they drafted the Full Faith and Credit Clause. As Mr. Justice Robert H. Jackson has observed:

> "* * * By the full faith and credit clause, they [the Framers] sought to federalize the separate and independent state legal systems by the overriding principle of reciprocal recognition of public acts, records, and judicial proceedings. It was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence * * *." Jackson, *Full Faith and Credit—The Lawyers Clause of the Constitution,* 45 Columbia L. Rev. 1, 17 (1945).

The incongruity of a geographically widespread group of risks having dissimilar coverage under the same insurance policy is thrust into the interstate relationships here present. As pointed out in the Statement of the Case, the insurance policies involved here were issued in Minnesota and covered the property of the insured-Respondent at 39 locations in five different states. The Wisconsin Supreme Court conceded that Minnesota law applied to a loss in Wisconsin. It may be fairly argued then, that Minnesota law would apply to an event occurring in any of the other four states in which the insured-Respondent's property was located. Yet the second *Osborne* opinion, in denying validity to Minnesota law, makes possible the unfortunate and legally repugnant incongruity of identical risks in five states covered by one contract of insurance to be within the coverage of the policy in one state and outside the coverage of the policy in a neighboring state. The insured

cannot be sure of the extent of coverage he has purchased, and the insurance carrier is denied a definite understanding of the risk—coverage it has assumed under the policy. Thus, the denial of full faith and credit to Minnesota law by the Wisconsin Supreme Court throws disastrous uncertainty into the complex interstate relationship of insurer and insured which includes, not least of all, the public and social interest in the vindication of both parties' expectations.

The incongruity of a geographically widespread group of risks having dissimilar coverage under the same insurance policy has already impelled this Honorable Court to prevent such an unfortunate result. The Court has used the Full Faith and Credit Clause in a line of cases involving contracts of life insurance in fraternal benefit organizations, to limit the forum states' ability to cause this incongruity by denying validity to concededly applicable law. See especially, *Sovereign Camp, W. W.* v. *Bolen,* 305 U. S. 66; 59 S. Ct. 35; 83 L. Ed. 45 (1938); *Modern Woodmen of America* v. *Mixer,* 267 U. S. 544; 45 S. Ct. 389; 69 L. Ed. 783 (1925); *United Commercial Travelers* v. *Wolfe,* 331 U. S. 586; 67 S. Ct. 1355; 91 L. Ed. 1687 (1946). The impelling reasons enumerated in these cases for application of the Full Faith and Credit Clause in order to reach uniformity of risk coverage for all members of the fraternal benefit organization (wherever located in the United States) equally apply to the application of Minnesota law in the instant case to reach a uniform result in cases arising under the interstate insurance policy present in this case. The same complex abiding insurance relationship which impelled the Supreme Court to use the full faith and credit compulsion in these cases is present here. *Sovereign Camp, W. W., supra,* 305 U. S. at 75. The Court's desire to prevent unpredictability and inequality in the fraternal benefit cases should also be a moving force here. *United Com-*

mercial Travelers, supra, 331 U. S. at 592. Justice Burton's observation, in one of these cases, upon the necessary attitude of a state when it is faced with the task of interpreting such a complex interstate contract, is equally relevant here:

> "* * * It is of the essence of the full faith and credit clause that, if a state gives *some* faith and credit to the public acts of another state * * * then it must give *full* faith and credit to those public acts * * *" 331 U. S. at 625.

The instant case comes within this principle, for Minnesota law organizes the relationships under the interstate insurance contract here. Indeed, four Justices of this Honorable Court understood that the majority of the Court were announcing a principle not limited to fraternal benefit cases:

> "* * * I fear it may be significant that the Court has conspicuously refrained from stating in unmistakable terms that its new doctrine applies only to fraternal insurance companies. . . ." 331 U. S. at 641 (Justices Black, Douglas, Murphy and Rutledge dissenting.)

These cases suggest a rationale for granting Petitioners' request. The security of interstate transactions is a fundamental tenet of federalism. A vast body of law has developed to assure the free movement of goods in interstate commerce. Interstate transactions of a contractual nature deserve no less protection. Indeed, the Full Faith and Credit Clause stands almost alone in the Constitution as an aid for resolving interstate conflicts in the context of private law. See, Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. of Chicago L. Rev. 9, 14 (1958).

The insurance contract in this case represents and identifies the common understandings of two multistate parties. One of these states involved should not be free to sub-

stitute, by mere fiat, a set of understandings different from those the parties had. Even the possibility of this substitution discourages interstate contractual activities by making it hazardous to contract in any but the entirely local situation. Such a state of affairs is directly contrary to a federal union in which free movement of goods and free ability to assume contractual obligations are made secure by the Commerce Clause and the Full Faith and Credit Clause. Local policy or proper local concern may correctly impel a state court to apply its own law, but mere caprice or deliberate decision to ignore concededly governing law of a sister state cannot be sanctioned. When local policy concerns have been eliminated by the court's initial choice of law process, as here, the case for this Honorable Court's intervention becomes that much stronger. See, Kramer, *Interests and Policy Clashes in Conflict of Laws,* 13 Rutgers L. Rev. 523, 549 (1959). The Full Faith and Credit Clause ensures that the important federal goal which it represents is placed upon the plane of constitutional obligations and is not left to voluntary feelings of comity. To fulfill a federal duty, Wisconsin owes scrupulous adherence to governing Minnesota law. Failure to do so is an "unjustifiable local entanglement" placing a burden on interstate commerce and services in the sense that this Honorable Court so recently used this term in *National Bellas Hess, Inc.* v. *Illinois Department of Revenue,* 386 U. S. 753, 760; 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). When the incongruities resulting from capricious application of law make it so very difficult to carry on an interstate business, such a denial of full faith and credit to governing law places a burden on commerce.

The policies that impel full faith and credit to the statutory and decisional law of another state are extremely strong here.

"Always to be kept in mind in dealing with these prob-

> lems is that the policy ultimately to be served in application of the clause is the federal policy of 'a more perfect union' of our legal system. No local interest and no balance of local interests can rise above this consideration. * * * " Jackson, *supra*, p. 27.

A more perfect union is one in which the same contract, governed by the same law in two different cases with indistinguishable facts, should have the same meaning. Uncertainty of contractual obligations and unnecessary complexity in interstate relationships is equivalent to a barrier which blocks the interstate movement of goods.

II.

The Supreme Court of Wisconsin, in Its Opinion on the Second Appeal Did Not Give Erroneous Construction to the Views of the Minnesota Supreme Court in Honeymead, But Denied Their Validity by Actually Rendering a Decision Diametrically Opposed to the Honeymead Holding.

Petitioners, at the expense of redundancy, emphasize that the decision of the Minnesota Supreme Court in *Honeymead* found an "explosion" to be an active force (force actually in motion) which suddenly and violently seeks release. To the contrary, the Supreme Court of Wisconsin, in the second appeal, for which review is sought here, found an "explosion" to be the sudden release of any pressure. These two concepts cannot stand side by side. No matter what language the Supreme Court of Wisconsin used, and no matter what courtesy they extended to *Honeymead* (See Appendix, p. 5), the plain fact remains that Wisconsin simply enunciated a new and diametrically opposed concept of explosion. Patently, Wisconsin denied the validity of the governing Minnesota law.

We are, of course, familiar with the principle of *Glenn* v.

Garth, 147 U. S. 360, 368-69; 13 S. Ct. 350; 37 L. Ed. 203 (1893), which holds that a merely erroneous construction of a sister state statute does not rise to the dignity of a constitutional wrong. Whether the *Glenn* principle would be applied to judicial decisions of a sister state is a question which need not be adjudicated in the case at bar because here we do not have erroneous construction of either a sister state statute or decision, but, rather, we have a flat denial of the validity of the law of a sister state. No decision of this Honorable Court applying the *Glenn* principle has precluded review by this Court where an important federal interest has appeared. Such a federal interest appears when a sister state's statute or decisional law (as here) is admittedly determinative of the issues before the deciding state court, and the state court arbitrarily has decided that it will not apply the law, or seeks judicial refuge in a bald, but unjustified assertion that the statute or decision says "Y" when it actually says "X". Though such court may call its activity a "reading", such a "reading" turns the statute or common law decision on its head, and, in fact and legal effect, denies validity to the law. This is the present case, for the second *Osborne* opinion, (a) by defining an explosion as the mere release of any pressure (irrespective of the causative factors of such pressure), and (b) by refusing to limit the legal concept of explosion to occurrences in which a force actually in motion suddenly and violently seeks release (as decided in *Honeymead*), denies validity to *Honeymead*, the concededly governing Minnesota law.

When a court says it does not "read" a decision in one way, but another, and its "reading" in fact results in denial of the legal strength, force and effect of the law before it (whether statutory or common law), the court has denied validity to that law. The net product of Wisconsin's second decision in *Osborne* is a holding completely at odds with Minnesota law.

Conclusion.

Wisconsin's denial of validity to a public act of Minnesota is a plain violation of the Full Faith and Credit Clause. If Wisconsin's decision is allowed to stand, the decision's grave overtones will throw uncertainty into the insurance industry, and have adverse effects for insureds and insurers alike over the entire country. Indeed, these grave overtones have already been heard. There has already been a compounding of the vice inherent in Wisconsin's denial to petitioners of a basic constitutional right. The second *Osborne* decision stands as a maverick in its particular body of law.

The very crux of such decision (see pp. 10, 8, *supra*), a holding which amounts to a denial of full faith and credit, has already become the basis of decisions in four subsequent cases (Nebraska and Kansas) involving identical occurrences and the same type of insurance coverage (see Appendix, pp. 46-56; see especially, p. 47 and p. 54, "finding" No. 10). In this manner the vice inherent in the denial to petitioners of their constitutional rights in this case is being compounded and is being given wider judicial acceptance. The denial of full faith and credit, if allowed to stand, will plainly have a tendency to invite further erosion of those constitutional rights which preserve the vitality of interstate commerce.

The second *Osborne* decision looms over the economic scene as a barrier tending to prevent a major segment of American business life from entering, with certainty, into meaningful contractual relationships which characterize multi-state business. If the decision challenged here is allowed to stand, Wisconsin and other state tribunals, by mere caprice, will be free, in the future, to disrupt complex interstate relationships. Only further review by this

Honorable Court can undo the mischief already done by the second decision in *Osborne*. This Honorable Court is the only tribunal which can restore to petitioners their constitutional rights.

For the foregoing reasons, this Petition for a Writ of Certiorari to the Supreme Court of Wisconsin should be granted.

Respectfully submitted,

DONALD N. CLAUSEN,
FRANCIS J. WILCOX,
RUDOLPH E. ANDERSON,
Counsel for Petitioners.

CLAUSEN, HIRSH, MILLER & GORMAN,
135 South LaSalle Street,
Chicago, Illinois, 60603,

WILCOX & WILCOX,
Suite 500,
Union National Bank Building,
Eau Claire, Wisconsin, 54701,

HUGHES, ANDERSON, DAVIS & WITKIN,
218 Telegram Building,
Superior, Wisconsin.